SUBJECT INDEX

	Page
TABLE OF CASES and OTHER AUTHORITIES	i
OPINIONS	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	6
ARGUMENT:	24
I. PETITIONER HAS BEEN DENIED A CONSTITUTIONAL RIGHT TO A CIVIL TRIAL BY JURY.	26
II. WHERE A PERIOD OF ADMINISTRATIVE DISQUALIFICATION IS BASED UPON AN ACCUMULATION OF CHARGES, ALL OF WHICH WERE DENIED, UPON REVIEW DE NOVO THEREOF THE DISTRICT COURT ERRED IN RULING THAT IT COULD NOT MODIFY SAID PERIOD EVEN IF LESS THAN ALL OF THE ACCUMULATED CHARGES WERE PROVEN.	36
III. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT THE ADMINISTRATIVE ACTION WAS VALID SINCE A NUMBER OF THE ALLEGED VIOLATIONS WERE NOT SUPPORTED BY ANY CREDIBLE EVIDENCE.	46

CONCLUSION 52

CERTIFICATE OF SERVICE 53

PETITION APPENDIX:

UNITED STATES DISTRICT COURT
OPINION AND ORDER (JURY ISSUE) 54

UNITED STATES DISTRICT COURT
MEMORANDUM OPINION AND ORDER
(TRIAL ON MERITS) 64

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
(PER CURIAM OPINION) 87

TABLE OF CASES AND OTHER AUTHORITIES

	Page
Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)	28, 30
Bermudez v. United States, 348 F.Supp. 1279 (D.C.D.C. 1972)	35
Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969)	36
Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961)	34
Curtis v. Loether, __ U.S. _____, 39 L. Ed. 2d 260	24,26,27
Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962)	28,29
Goldberg v. Kelly, 397 U.S. 254 (1970)	33,34
J. C. B. Super Markets, Inc. v. United States, 57 F.R.D. 500 (W.D.N.Y. 1972)	44
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)	34
Martin v. United States, 259 F.2d 300 (6th Cir. 1972)	25,43,45
Miller v. United States, 345 F.Supp. 1131 (W.D.Pa. 1972)	45
Murry v. United States, 348 F.Supp. 242 (D.C.D.C. 1972)	35

Page

Parsons v. Bedford, 26 U.S. (3 Pet.) 255 (1830) 35

Peoples v. United States, 427 F.2d 561 (D.C. 1970) 43

Ross v. Bernhard, 396 U.S. 531 (1970) 26,28,29,30

Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932) 30

Scott v. Neely, 140 U.S. 106 (1891) 36

Simler v. Conner, 372 U.S. 221 (1963) 35

Thermo-Stitch, Inc. v. Chemi-Cord Proc. Corp., 294 F.2d 486 (5th Cir. 1961) 29

Tights, Inc. v. Stanley, 441 F.2d 336 (4th Cir. 1971) 29

United States v. First City National Bank, 386 U.S. 361 (1967) 44

Welch v. United States, 464 F.2d 682 (4th Cir. 1972) 25,37,38 39,41,42,43,45

5 U.S.C. § 706 (2) (F) 3,41

7 U.S.C. § 2020 6,25,38

7 U.S.C. § 2022 4,8,31,38,40,42,43

Davis, Admin. Law, Vol. 4 § 29.08 45

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on the 16th day of January, 1974.

OPINIONS

The per curiam decision of the United States Court of Appeals for the Fourth Circuit, while not reported, is appended.

As the decision below was per curiam, the opinions and orders of the United States District Court for the Eastern District of Virginia, Norfolk Division, on the issues involved herein are similarly appended.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered in this cause on the 16th day of January, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

1. Was Petitioner wrongfully denied a trial by jury in the trial de novo before the United States District Court for the Eastern District of Virginia, Norfolk Division?

2. Was Petitioner wrongfully denied the opportunity to have the propriety of the period of disqualification separately reviewed by the United States District Court for the Eastern District of Virginia,

Norfolk Division?

3. Was there credible evidence to support the decision of the United States District Court in upholding the administrative sanctions imposed upon Petitioner?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved herein:

1. The Seventh Amendment to the United States Constitution provides as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. 5 U.S.C. § 706 (2) (F) which provides:

> "The reviewing court shall ... (2) hold unlawful and set aside

agency action, findings and conclusions found to be ... (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

3. 7 U.S.C. § 2022 provides:

"Whenever--

(a) ....

(b) a retail food store or a wholesale food concern is disqualified under the provisions of section 2020 of this title, or

(c) .... notice of such administrative action shall be issued to the retail food store or wholesale food concern involved. Such notice shall be delivered by certified mail or personal service. If such store or concern is aggrieved by such action, it may, in accordance with regulations promulgated under this chapter, within ten days of the date of delivery of such notice, file a written request for an opportunity to submit information in support of its position to such person or persons as the regulations may designate. If such a request is not made or if such store or concern fails to submit information in support of its position after filing a request, the administrative determination shall be final. If such a request is made by such store or concern, such information as may be submitted by the store or concern, as well as such other information as may be available, shall be reviewed by the person or persons designated, who shall, subject to the right of judicial review herein-

after provided, make a determination which shall be final and which shall take effect fifteen days after the date of the delivery or service of such final notice of determination. If the store or concern feels aggrieved by such final determination he may obtain judicial review thereof by filing a complaint against the United States in the United States district court for the district in which he resides or is engaged in business, or in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon him, requesting the court to set aside such determination. The copy of the summons and complaint required to be delivered to the official or agency whose order is being attacked shall be sent to the Secretary or such person or persons as he may designate to receive service of process. The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence. During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless an application to the court on not less than

ten days' notice, and after hearing thereon and a showing of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal."

4. 7 U.S.C. § 2020 provides as follows:

"Any approved retail food store or wholesale food concern may be disqualified from further participation in the food stamp program on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter, or of the regulations issued pursuant to this chapter. Such disqualification shall be for such period of time as may be determined in accordance with regulations issued pursuant to this chapter. The action of disqualification shall be subject to review as provided in section 2022 of this title."

STATEMENT OF THE CASE

As portions of the record in the United States District Court for the Eastern District of Virginia, Norfolk Division, are relied upon hereunder and are voluminous, a separate copy of the record, as included in the voluminous

Appendix heretofore filed in the United States Court of Appeals for the Fourth Circuit is filed herewith and references to "Appendix" hereafter refer to said separate Appendix.

On April 28, 1971, the U. S. Department of Agriculture, Food and Nutrition Service, Atlanta, Georgia, specified charges against Rural Foods, Inc. (hereinafter referred to as "Rural") for alleged violations of the Food Stamp Program. On July 7, 1971, the same said agency advised Rural that pursuant to the Food Stamp Regulations (35 F.R. 19737, et seq.) it was the determination of the Director under Section 272.6(c) of said regulations that Rural or its employees "violated the regulations governing the Food Stamp Program, 7 C.F.R. 1600-1604 (renumbered 7 C.F.R. 27-274, 12-30-1970), in the manner specified in the latter of charges" dated April 25, 1971 (Appendix

0007). The Director further advised that Rural, in consequence of its violations, shall be disqualified from participation in the Program for a period of one year.

Thereafter, Rural followed its available administrative remedy and requested review of the Director's determinations by the Food Stamp Review Officer, Washington, D.C. Upon said review, Rural was informed by letter dated October 29, 1971 (Appendix 0001) that the Food Stamp Review Officer concluded "that the violations, substantially as charged, did, in fact, occur" at Rural's store, and that said violations were "flagrant, repetitive and seriously damaging to the two basis objectives of the Program--to increase the consumption of domestically produced food items and to increase the nutrition in the diets of needy families" (Appendix 0006).

Pursuant to Title 7 U.S.C. §2022

Rural filed the present suit in the United States District Court for the Eastern District of Virginia, Norfolk Division, and moved for trial by jury. The District Court rendered an opinion on the motion (Petition Appendix, p. 54), denied said motion for jury trial, and proceeded to take testimony upon the "trial de novo" on September 5, 1972. Thereupon the Court rendered an opinion on November 15, 1972 (Petition Appendix, p. 64), upholding the validity of the administrative action and sanction against Rural--a one-year disqualification from participation in the Food Stamp Program. Thereafter Rural perfected an appeal from the Court's judgment entered on January 22, 1973, and on January 16, 1974, the United States Court of Appeals for the Fourth Circuit entered its order affirming the judgment of the said District Court.

At the trial de novo held before the said United States District Court the following facts were developed.

The President of Rural, Mr. Glaser, testified first, and, as to the charges of April 28, 1971 (See Appendix 0007-9) which are the basis for disqualification, he denied those charges numbered 4, 5, 6, 11, 12 and 13 (Appendix 0036-38). As to charge number 4, a sale of ineligible items on April 21, 1970, Mr. Glaser admitted to voluntarily pleading guilty to charge number 4. However, he further testified that he did so because of the numerous charges placed against him and his desire to avoid a lengthy jury trial on all of these charges. He felt, after consultation with counsel, that he was better off to plead guilty to this one misdemeanor charge and hope for a fine, even though he never operated a cash register so as to be in

a position to violate the regulations referable to the sale of ineligible items (Appendix 0038-39).

With reference to charge number 10, Mr. Glaser testified that he was unaware that Mr. Moore had ever purchased food stamps for cash; that after Mr. Moore had pled guilty to this charge and after Mr. Glaser had some indication from Mr. Moore that he in fact might truly have been guilty of the charge, he released him from Rural's employment (Appendix 0046-48).

Specifically, with reference to charge number 13, Mr. Glaser testified that in the spring of 1970 he was asked by the Welfare Department of the City of Portsmouth to allow welfare recipients food on credit because the welfare checks had not been distributed due to a computer failure. He was to be repaid in food stamps for the food purchased by said

recipients at a time after they had received their late checks. Theretofore he did not have a credit business, and, in the process of making this accommodation at the City's request, he lost thousand of dollars when back bills were not taken care of by some of the customers. See Appendix 0049-52.

During the course of Mr. Glaser's testimony, he recited the gross sales figures for the store in question for significant periods of time both before and after he entered into the Food Stamp Program on March 19, 1969. These figures reflected an increase in sales after entry into the Program--however, it was not that great an increase, taking into consideration the rising costs of food and the percentage of food stamp business done by Rural. See Appendix 0043-46.

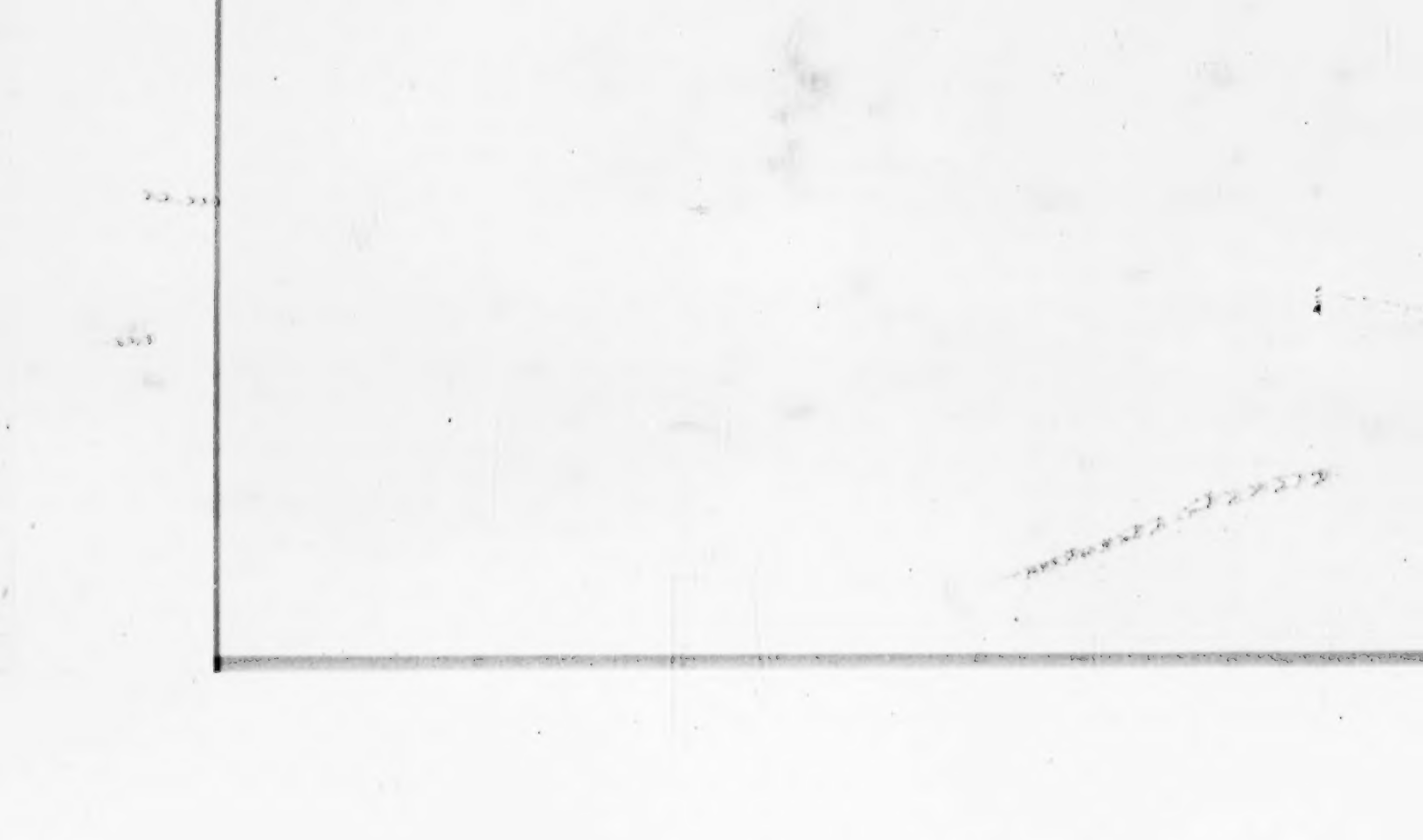
Mr. Glaser also described the fire which closed his business from Decem-

ber, 1970 to June, 1971, and indicated that he had a new investment in the rebuilt store of approximately $500,000 (Appendix 0040-42). Also, he indicated that of his gross sales of approximately one million dollars a year, better than seventy-five per cent of those sales came from food stamps (Appendix 0046), and that he furnished free transportation for customers who otherwise had no way to carry groceries home (Appendix 0059-60). He stated to the Court that the loss of food stamp business for one year would put him out of business forever (Appendix 0063). Lastly, Rural had undertaken to rebuild a new store and incurred the aforementioned obligations prior to the letter of charges of April 28, 1971 (See Appendix 0046).

Rural then called Police Officer D. K. Butler to the stand, who testified that he had been employed part time

as a security guard by Rural since 1968, and during the period April 15, 1970 to May 6, 1970 had worked five days a week "up front" by the cash registers. He had been instructed by Mr. Glaser to make sure ineligible items were not sold for food stamps, and during his entire employment he had never seen Mr. Glaser work the registers in the checkout lines. See Appendix 0065-76. As he testified, Mr. Glaser didn't run the registers (Appendix 0068-69).

Doris Deans, who worked full time as a checker during the period of time in question, was no longer employed by Rural but testified also that Mr. Glaser never worked the registers. Additionally, she testified that she was instructed by Mr. Glaser not to sell ineligible items for food stamps and did not do so during her tenure at the store. See Appendix 0077-83. Debbie Malcolm,



another former checker, testified in like manner with reference to her employment from August, 1968 to July, 1969. See Appendix 0108-0111.

Mr. William F. Moore, the former store manager, admitted to charge number 10 of the charge letter of April 28, 1971, and denied charge number 8 of the same letter (Appendix 0085). With reference to the former, he stated that he did this illegal act without Mr. Glaser's knowledge and contrary to his instruction in the food stamp program. Thereafter, when he indicated to Mr. Glaser that he could well have thus acted, Mr. Glaser fired him (Appendix 0087-88). Previous to this semi-admission to Mr. Glaser, he had denied the charge (Appendix 0087).

Mrs. Rose Wax, a checker as well as a relative of Mr. Glaser, testified that she was not guilty of charges

numbered 1, 2, 3, 7, 9 and 11. She emphatically denied ever selling ineligible items and reconfirmed that Mr. Glaser never worked the cash registers. See Appendix 0096-0107.

The defendant then presented its case by first calling Mr. W. Farley Powers, Clerk of the United States District Court, for the purpose of establishing that Mr. Glaser had pled guilty to Count Four of a previous indictment (the same as charge number 4); Mr. Moore had pled guilty Count Nine (the same as charge number 10); and Rural had pled guilty to Count One of the indictment. See Appendix 0112-0113. All other counts of the indictment were dismissed upon motion of the United States Attorney, including all other counts against Mr. Glaser, Mr. Moore and Mrs. Wax.

Mr. Leon Saunders, in charge of the Food Stamp Program in the City of

Portsmouth, then testified that Rural had much higher sales in food stamps than A & P which is in the same neighborhood. See Appendix 0117-0118. He had no verified figures of gross sales (Appendix 0121-0122). Also, he stated that he had spoken to Mr. Glaser about his food stamp volume and alleged complaints. Mr. Saunders testified that after the investigation by Department agents, he had recommended a six-month suspension from the program but his recommendation had not been accepted by Atlanta (Appendix 0127). He felt that his six-month suggestion and the one-year suspension were justified because of the great number of charges and the fact that these charges included the purchasing of food stamps for cash. Thus, he testified that his case was beyond the usual case of a sixty-day suspension meted out to stores who had violated the ineligible sales regulations

of the Food Stamp Program. See Appendix 0128-29.

Margaret Pope was then called by the United States. She stated that she had worked for Rural four years up until some time in 1970. During this time she had accepted ineligible items for food stamps at Mr. Glaser's direction and had seen Mr. Glaser and Mr. Moore accept food stamps for cash. She had seen Rose Wax violate the ineligible item regulations, and other checkers had been told by Mr. Glaser that they could do the same. See Appendix 0131-0140. She was now working for Farm Fresh--Mr. Glaser had allegedly gotten her the job--and she had recently been hospitalized for psychiatric care (Appendix 0143-44), as was evident from her testimony. See Appendix 0136-38.

A Gertrude Gregory then testified that she had been a customer at

Rural's store and on one occasion had seen a woman get money from the manager and take it to a nearby bank, thereafter returning with food stamps. She could not remember when this incident occurred in 1970--before or after May. Also, in 1970 she supposedly saw ineligible items sold for food stamps--again no month was indicated. See Appendix 0146-0151.

An investigator for the Department of Agriculture, Stanley Letherman, then testified that he had recruited two women to shop Rural with food stamps. They were Joyce P. Johnson and Malinda O. Royster. They were provided with invisibly marked food stamps and sent into Rural's store to purchase ineligible items. Mr. Letherman asked them if they had any money on them before they went into the store, and he told them to leave their purses in his car which he parked nearby. When they returned from each

shopping trip, they reported what they purchased and returned unused stamps to him. The items were listed with their costs on a sheet after he returned them to their respective homes. The shoppers were paid on an hourly basis--in cash. The marked food stamps ultimately were obtained by him from the Federal Reserve Bank in Richmond, and these bore no bank stamp from a Portsmouth bank or any other bank. The groceries purchased were donated to charity and the beer and wine held as evidence. Due bills--change for food stamp purchases--were turned over to him by the shoppers. See Appendix 0152-0175.

Mr. Letherman later spoke to both Mr. Glaser and Mr. Moore and neither would discuss the alleged incidents with him. Both denied any violations (Appendix 0164-65).

Joyce Johnson then testified to

purchases she had made at Rural's store on April 15 and 18 and May 6--allegedly all from Mrs. Wax. She produced some handwritten itemizations as well as typewritten information that she used to refresh her recollection. The typewritten reports were not typed by her but were subsequently signed by her. At the time of the purchases she had no cash on her and left her pocketbook in Letherman's car. During this same period of time she shopped other stores as an agent for Mr. Letherman and did such on the very same days that she shopped Rural. Also, she testified that on May 6 she tried to sell Mrs. Wax some stamps for cash but was refused. She then asked Mr. Moore to give her $15.00 for $20.00 worth of stamps--he did such without her giving the first excuse for needing the money. See Appendix 0176-0219.

Malinda Royster then testified

to making similar purchases of ineligible items from Mrs. Wax on April 16; from Mr. Glaser on April 21; and from Mrs. Wax on May 1, 1970. Also, on April 21 she allegedly sold Mr. Glaser $40.00 in food stamps for $30.00, and on May 1, $100.00 in food stamps for $50.00 in cash from Mr. Moore. She testified from typewritten notes typed by another and signed by her. Upon a most vigorous cross-examination she could not remember a number of facts incident to the purchases and the way the items of purchase were reviewed by her and Mr. Letherman. She, too, was paid in cash by Mr. Letherman and worked other stores on the same days she made the Rural purchases. She specifically remembered both Mr. Glaser and Mr. Moore from her two visits to the store in 1970. See Appendix 0220-0266.

Then a Mr. Parrish of the Federal Reserve Bank of Richmond testified

that certain food stamp coupons marked by Mr. Letherman turned up in deposits from the American National Bank, Portsmouth, Virginia. See Appendix 0267-0274. Mr. Donald V. King of the said American National Bank was called by the United States but he could not tie in those coupons identified by Mr. Parrish as having come from a deposit in his bank by Rural. See Appendix 0275-0281.

Mr. Glaser returned to the stand on rebuttal to establish certain prices of items allegedly purchased by Joyce Johnson on April 18, 1970--these items had no prices on Joyce Johnson's list of purchases for that date. See Appendix 0282-83.

ARGUMENT

The argument hereinafter set forth in support of this petition is in three parts, each of which addresses itself to the questions presented for review and each of which covers all of the issues heretofore presented in the United States Court of Appeals for the Fourth Circuit.

However, it is respectfully submitted that the first point of the argument, Petitioner's denial of a constitutional right to a civil trial by jury, is an important question of federal law which has not been, but should be, settled by the Court. More particularly is this true in light of the Court's recent decision in Curtis v. Loether, _____U.S._____, 39L. Ed. 2d 260, which decision was rendered by the Court subsequent to the Fourth Circuit's decision in this case.

The second and third parts of the argument are similarly involved with important questions of federal law which have not been, but should be, settled by the Court. It is important that the Court consider issues of importance in the administration of the Federal Food Stamp Program, 7 U.S.C. §2020, et seq. In these types of cases which have reached circuit courts of appeal, Martin v. United States, 259 F.2d 300 (6th Cir. 1972); Welch v. United States, 464 F.2d 682 (4th Cir. 1972), there has been a cogent dissent as well as a similar concurring opinion which casts strong doubt over the majority opinions and, thereby, the administration of the federal program involved.

I. PETITIONER HAS BEEN DENIED A CONSTITUTIONAL RIGHT TO A CIVIL TRIAL BY JURY.

The District Court, upon consideration of Rural's demand for a jury trial, reviewed the case law on the Seventh Amendment right to trial by jury in civil cases. The case law test for the recognition of this constitutional right was based on Ross v. Bernhard, 396 U.S. 531 (1970). Petitioner does not argue that the test established below is incorrect. Rather, it is Rural's position that the test has been incorrectly applied in the instant case, and a correct application thereof dictates that a jury trial should have been granted.

Similarly neither the District Court nor the Circuit Court had before it the benefit of the language in Curtis v. Loether, supra, wherein the Court went even further than the Ross case and

granted the right to a civil trial by jury even though a federal statute provided that "[t]he Court" was empowered to grant certain relief and there was nothing to indicate within the statute that a jury trial was ever intended. Moreover, the argument in favor of a jury trial in this matter is in conflict with the view that the "concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder", Curtis v. Loether, supra, at 266, n.8. This is true since we are involved herein with a trial de novo from an administrative determination and not an administrative agency hearing that meets the requirements of due process. Nothing is clearer than that a logical extension of Curtis v. Loether, supra, would lead to a granting of Seventh Amendment rights to the Petitioner.

Ross v. Bernhard, supra, stated that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action". Id at 538. Such a test was the natural outgrowth of previous decisions, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), and yet, the test creates, in its lack of precision, as many problems as the test sought to alleviate. What is the meaning of the "nature of the issue"? How do you determine it? What do you look to in making that determination?

In the instant case, the Court states that trial by jury was denied because the relief sought by Rural was an injunction to enjoin the defendant from cancelling plaintiff's right to participate in the stamp program and that no damages were sought. Even if

this were correct--and it is not--was not the Court looking to form and not substance? Injunctive relief, in and of itself, does not establish what claim or rights are sought to be protected in the action in question. See Tights, Inc. v. Stanley, 441 F.2d 336 (4th Cir. 1971). Thus, it was noted in Thermo-Stitch, Inc. v. Chemi-Cord Proc. Corp., 294 F.2d 486, 491 (5th Cir. 1961):

> "It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theatres. It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury right it creates controls. This is the teaching of Beacon Theatres, as we construe it."

And this quote was itself cited with approval in Dairy Queen, Inc. v. Wood, supra, at 473 n.8, and the Ross case noted that "numerous courts and commenta-

tors have now come to the conclusion that the right to a jury should not turn on how parties happen to be brought into court". Ross v. Bernhard, supra, at 542, n.15.

Additionally, there is further engrafted upon this philosophy the Beacon Theatres, supra, doctrine that the trial court is "very narrowly limited" in its discretion vis-a-vis granting a jury trial, and "must, whenever possible" exercise its discretion "to preserve jury trials". Id at 510. CF. Schoenthal v. Irving Trust Co., 287 U.S. 92, 94 (1932). This reasoning is nowhere diminished by the ruling in Ross, and, in fact, is fortified by it to the extent that Beacon is used throughout Ross as guiding precedent.

Applying all of this to the case at bar, it is clear that the trial court should have looked beyond the

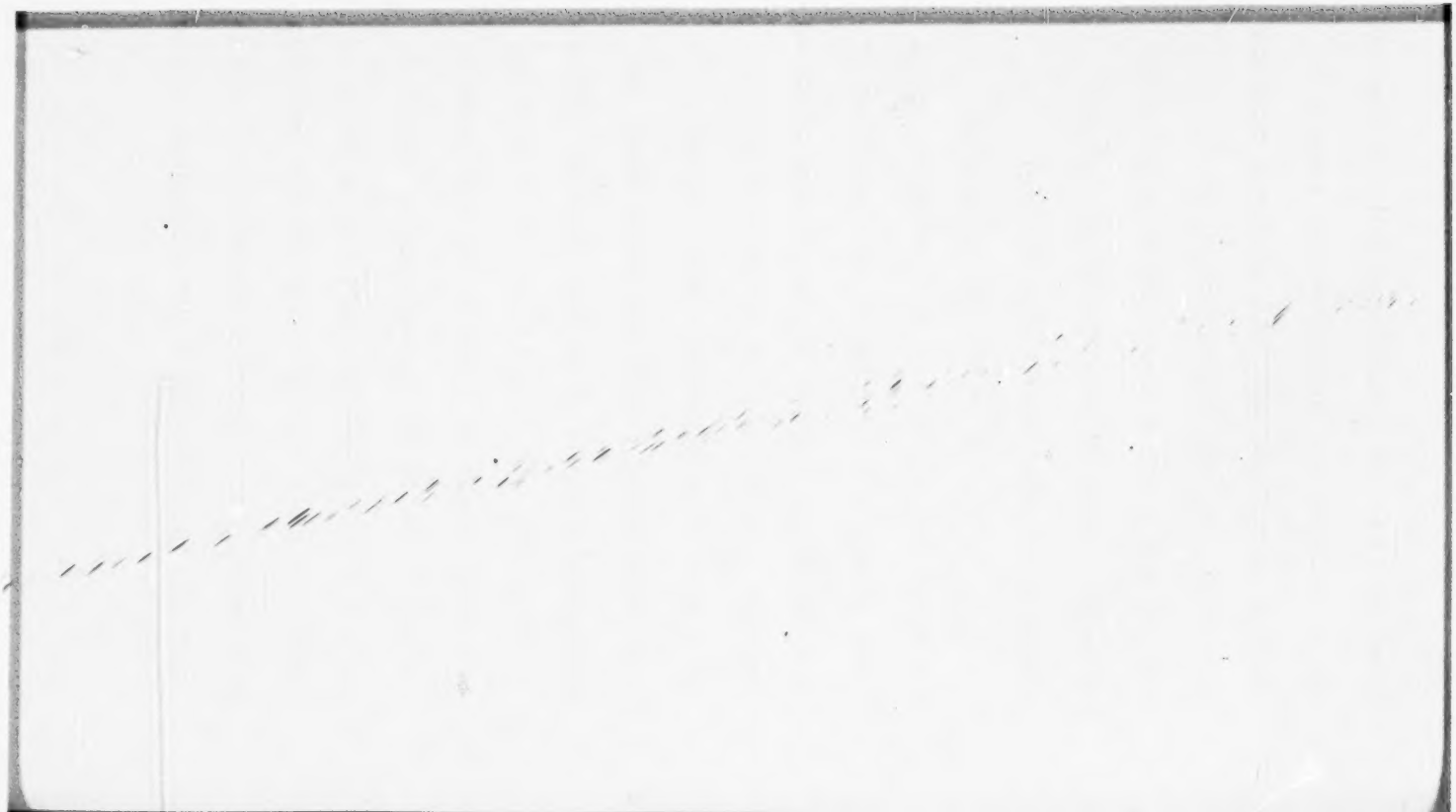
mere asking for injunctive relief and the failure to ask for damages. Title 7 U.S.C. §2022 provides for the grant of injunctive relief as merely ancillary to the main appeal de novo. Thus, the statute provides:

> "The suit in the United States district court or state court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence. During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless an application to the court on not less than ten days' notice, and after hearing thereon and a showing of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal."

Thus, injunctive relief is only a temporary measure to protect against immediate irreparable injury (here to

prevent loss of considerable business by Rural before the decision has been reviewed de novo), and the statute nowhere provides for any permanent injunctive relief but rather provides for a final determination of the validity of the questioned administrative action.

Had the trial court looked further, it could and should have noted that Rural was seeking a declaration of its right to remain in the stamp program through the method of review by trial de novo. Furthermore, Rural alleged in its complaint, paragraph 11A, that the disqualification from the program would bankrupt it and put it out of business. Its very right to remain in business--on the face of the complaint--was (and is) at stake. Rural took an initial position that its ability to do business was being controverted unlawfully by the improper actions of a governmental agency.



This was the gravamen of Rural's complaint--that the alleged charges were without substantiation both legally and factually (Complaint, paragraph 9) and the period of disqualification was harsh, unfair and improper (Complaint, paragraph 8B).

Moreover, Rural was seeking an adjudication of its "rights" under the program and in that manner was advancing a cause of action for the retention of its "property". As noted in Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970), "Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property" (Emphasis added). Moreover, constitutional challenges in this context "cannot be answered by an argument that public assistance benefits are 'a privilege and not a right'". Id at 262. Rather, it makes more sense,

under modern jurisprudence, to apply relevant constitutional restraints based upon how much one may be "condemned to suffer grievous loss", Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951), or "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action", Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). Goldberg v. Kelly, supra, at 262-263.

In the specific area of programs involving welfare benefits the determination of constitutional protection "depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication". Id at 362. If, as in the Goldberg case, supra, welfare recipients are entitled to the constitutional protection of due process, then certainly

participants in a welfare program, such as the federal Food Stamp Program, have a statutory entitlement that cannot be denied without due process, Bermudez v. U.S., 348 F.Supp. 1279 (D.C.D.C. 1972); cf. Murry v. U.S., 348 F.Supp. 242 (D.C. D.C. 1972); and the assertion of a legal right to remain in the Food Stamp Program as a bona fide retailer should be accorded no less a constitutional protection under the Seventh Amendment.

Within this framework Rural has sought to have its legal rights in the Food Stamp Program ascertained and determined. This may not be the type of suit which the common law recognized "among its old and settled proceedings", but it is the type of adjudication that should be afforded Seventh Amendment protection. See Parsons v. Bedford, 26 U.S. (3 Pet.) 255, 275 (1830). A longstanding federal policy favoring jury trials, Simler v.

Conner, 372 U.S. 221 (1963), should not be thwarted because of the source from which this claim arises. The right to jury trial is determined on the factors heretofore set forth and does not depend upon the source of the claim, Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969); cf. Scott v. Neely, 140 U.S. 106 (1891).

II. WHERE A PERIOD OF ADMINISTRATIVE DISQUALIFICATION IS BASED UPON AN ACCUMULATION OF CHARGES, ALL OF WHICH WERE DENIED, UPON REVIEW DE NOVO THEREOF THE DISTRICT COURT ERRED IN RULING THAT IT COULD NOT MODIFY SAID PERIOD EVEN IF LESS THAN ALL OF THE ACCUMULATED CHARGES WERE PROVEN.

The disqualification action taken by the United States Department of Agriculture was based upon a letter of charges setting forth thirteen alleged violations of food stamp program regulations. Appendix 0007-10. These charges were upheld, first by the Food and Nutrition Service, which invoked a one-year

disqualification, and then by the Food Stamp Review Officer, from whose decision this appeal de novo was taken.

The Food Stamp Review Officer's decision, the questioned administrative action whose specific validity is challenged upon appeal, states as follows:

> "After a careful review of the information before me, I must conclude that the violations, substantially as charged, did, in fact, occur at your client's store. The violations were flagrant, repetitive and seriously damaging to the two basic objectives of the program.....
>
> I have, therefore, determined that the one-year period of disqualification as proposed by the Director of the Food Stamp Division is fair and just and I am upholding that decision." Appendix 0006.

The case of Welch v. United States, 464 F.2d 682 (4th Cir. 1972), sets the frame of reference for the law applicable to the case at bar. It notes the basic provisions of the Food Stamp Act of 1964 as well as the statutory

basis for judicial review--7 U.S.C. §2020 and § 2022. Thus, the Act states that the "action of disqualification shall be subject to review as provided in Section 2022 of this Title", 7 U.S.C. § 2020, and said Section 2022 provides that there "shall be a trial de novo by the Court in which the Court shall determine the validity of the questioned administrative action in issue".

In the Welch case, supra, the Court established two basic rules in cases of this type:

> 1. "If the violations are proven (or, as here, admitted), and if the particular sanction is within the allowable range then the validity of the administrative action has been established."
>
> 2. "Reasonably construed, the statutory language does not authorize the Court to go beyond the issue of the validity of the disqualification action and modify the period of the administrative sanction."

Rural contends that under the Welch case

the trial court had the duty not only to sift the facts to see if all of the violations were proven, but also to determine if a lesser disqualification was appropriate if less than all of the violations were proven. This, the trial court refused to do. See Appendix 0020-22, n.3.

That this course of action is and should be available to the trial court is clearly set forth in Judge Butzner's concurring opinion in Welch. When applied to this case wherein the violations are all disputed and questionable, the logic of the concurring opinion is not in opposition to nor unsupported by the two basic rules heretofore quoted from the Welch opinion. Thus, while not going beyond the issue of the validity of the disqualification but actually going directly to that issue, the trial court was in a position to sift the facts

to see if all of the violations were proven and, if not, which, if any, were proven and what disqualification was then appropriate.

Not only does the case law dictate the above procedure but the very language of the disqualification action itself taken by the Department of Agriculture as quoted above dictates that the case be reviewed in the same manner. That disqualification action noted an opinion that "the violations, substantially as charged, did, in fact, occur", and that they were "flagrant" as well as "repetitive" and that the "one-year period of disqualification, as proposed by the Director of the Food Stamp Division, is fair and just, and I am upholding that decision" (emphasis added). Appendix 0006. Under 7 U.S.C. §2022 it is this very decision that is being reviewed. To state the matter otherwise,

the rules as enunciated in the Welch case must be applied to the actual disqualification action appealed from, and in the instant case this is an appeal from the Food Stamp Review Officer's findings as to both the commission of the violations and the fairness and justness of the disqualification.

The Administrative Procedures Act, 5 U.S.C. §706 (2) (F) in like manner provides for a total appeal that encompasses review of sanctions as well as the violations that are the basis for the sanctions. Thus, it provides:

> "The reviewing court shall (2) hold unlawful and set aside agency action, findings and conclusions found to be (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." (Emphasis added)

In the case at bar the Food Stamp Review Officer's determination that the disqualification period is "fair and just"

and that he is "upholding" it is as much a part of his "action, findings and conclusions" as his determination that "the violations, substantially as charged, did, in fact, occur". To rule otherwise would be contrary to the authority vested in the Food Stamp Review Officer. See 7 U.S.C. §2022.

It might be argued from both the Welch case and the cases cited in it with approval that the district court can do no more than to see whether or not the Department of Agriculture had substantial evidence upon which to base its overall disqualification action. The cases do not stand for this proposition. All of the cases, including the Welch case, involved appeals wherein the retailer admitted all of the violations as charged. Thus, the Court's hands were tied and the framework of the appeal was not one within which the

Court could determine (as the tryer of the facts) whether or not the violations were proven. The very use of the word "proven" in the Welch case gives to the district court its ability to sift the facts and weigh the evidence. Where all violations are admitted, the tryer of the facts has nothing to try.

In the case of Martin v. United States, 259 F.2d 300 (6th Cir. 1972), the lower court had made a determination that the violations of the Food Stamp Program had occurred (since they were admitted). Faced with this uncontroverted finding of fact there could be no review of the length of period of the disqualification.

In the case of Peoples v. United States, 427 F.2d 561 (D.C. Cir. 1970), The review provisions of 7 U.S.C. §2022 were analyzed and the court noted that this section "both avoided any

possibility that the distributors would be held without a legal right to complain of adverse agency action, and gave them a trial de novo well beyond the scope of review available under the general provisions of the Administrative Procedures Act." See also J. C. B. Super Markets, Inc. v. U.S., 57 F.R.D. 500 (W.D.N.Y. 1972).

It is respectfully submitted that it is inescapable that the Act provides broader review and thereby the ability in the district court as the tryer of the facts to make determinations on contested questions of violations and penalty. The Supreme Court of the United States has noted that a de novo appeal gives the court the right to make independent determinations of the issues where the same are contested. See United States v. First City National Bank, 386 U.S. 361 (1967), (involving the

Bank Merger Act of 1966). See also Davis, Admin. Law, Vol. 4 §29.08, supp.

If this Court does not give effect to the logic of the concurring opinion in the Welch case and announce that said opinion is consistent with the rules established in that case, there will be many instances wherein justice will have to take a back seat to conservative statutory construction. Such an instance occurred in Miller v. U.S., 345 F. Supp. 1131 (W.D. Pa. 1972) when the court found a one-year disqualification to be "oppressive and beyond fair play and reason", and yet, under its reading of the authority of Welch and Martin v. U.S., 459 F.2d 300 (6th Cir. 1972) found itself "without jurisdiction and powerless to act, change or modify the conclusion of the Department of Agriculture....." (emphasis added). Id at 1132. Oppressive governmental acts

should not be rewarded thusly. In the case at bar the trial court in like manner felt itself constrained not to consider the period of disqualification as part of its field of de novo review. The district court's bonds should be untied.

III. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT THE ADMINISTRATIVE ACTION WAS VALID SINCE A NUMBER OF THE ALLEGED VIOLATIONS WERE NOT SUPPORTED BY ANY CREDIBLE EVIDENCE.

Rural's third argument on appeal is the natural progression of its second argument--the test to be applied in a trial de novo that encompasses a denial of alleged accumulated violations of the food stamp program. On the basis of the former argument, Rural notes herein that of the thirteen alleged violations set out in the original charge letter (Appendix 0007-10) at least four of the

charges were not supported by any credible evidence. These are charges numbered 5, 11, 12 and 13 (Appendix 0008, 0009) in the letter of charges and are separate from those charges which involved the two shoppers hired by the government to create alleged violations.

Thus, charge number 5 relates to an alleged shortchanging in violation of the regulations. Appendix 0008. This incident allegedly occurred upon a purchase by Malinda Royster on April 21, 1970 (Appendix, 0161), as testified to by Mr. Letherman. However, he was not the person doing the shopping but rather one who only received information and goods from the purchaser (Appendix 0248), and he characterized this incident as "an apparent shortchanging". Appendix 0160. When the purchaser herself testified, she made no mention of this incident of so-called "shortchanging".

Appendix 0227-0232. Certainly then, the mere reference by one, not directly involved, of an "apparent shortchanging" is not enough to sustain the charge. The trial court made no mention of this charge in its findings.

As a separate and distinct charge, number 11 (Appendix 0009) alleges generally a sale of ineligible items between April, 1969 and April, 1970. These were not charges related to the government shoppers, and the only witnesses who testified to incidents of sales other than the shoppers were Margaret Pope and Gertrude Gregory. Mrs. Gregory doesn't know when in 1970 this happened, i.e., that she saw ineligible items sold (Appendix 0148-0151), and Mrs. Pope similarly cannot say when the incidents ocurred and admits to having a poor memory on dates as well as years. Appendix 0132, 0140-0141.

Moreover, Mrs. Pope's own testimony strongly questions her ability to remember. See Appendix 0143-0144. Again, no credible evidence was forthcoming on this charge.

As to charge number 12 (Appendix 0009), that Mr. Glaser accepted food coupons in exchange for cash between April, 1969 and April, 1970, Mrs. Gregory's testimony is likewise lacking in establishing a time frame. Appendix 0148-0149. Mrs. Pope's testimony falls subject to the same criticism as above (Appendix 0132, 0140-0141), and in this area of alleged violation is contradictory on its face. Thus, her testimony at page 0132, Appendix, reads as follows:

Line 10:

"Q. Now, while you were working there did you ever accept food stamps--

A. Yes, sir.

Q. --for cash?

A. Yes, sir."

And immediately afterwards she testified at page 0134, Appendix, directly opposite, as follows:

Line 13:

"Q. Did you ever purchase any stamps for money?

A. Did I?

Q. Yes.

A. No, sir."

How could any credibility be given to her testimony?

The last charge, totally unsupported, is number 13 (Appendix 0009), and deals with alleged acceptance of food coupons in payment of back bills between April, 1969 and April, 1970. Mr. Glaser himself testified that except for one instance in the spring or summer of 1970 his store never accepted coupons upon back bills, and the one exception

was upon the request of the Portsmouth Welfare Department when its computer broke and welfare checks were late. Appendix 0049-52. Thus, dates in 1970 were not established, and, more importantly, Rural had uncontradicted testimony that the very welfare department that provides access to food stamps for the poverty-stricken had asked that this action be taken. Not only is there a lack of culpability involved herein; there is governmental sanction for the acts. Again, no credible evidence to support the charge.

While Rural seriously questions the trial court's findings on those charges for which there was some proof, not only for reasons of identification but also because of the methods used by the shoppers, still further, Rural takes great exception to findings that certain charges were proven when, in fact, no

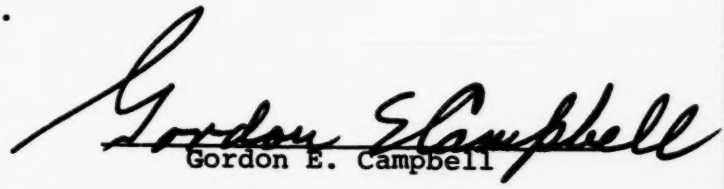
credible evidence was proffered to support them.

CONCLUSION

For the reasons above stated the Petitioner, Rural Foods, Inc., prays that its petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit be granted.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Revised Rules of the Supreme Court of the United States, I hereby certify that pursuant to Section 2(a) thereof personal service of this petition has been made on the 16th day of April, 1974, upon all parties required to be served, the same being the Solicitor General as well as the United States Department of Agriculture.



Gordon E. Campbell

PETITION APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action
No. 671-71-N

RURAL FOODS, INC.,
t/a SHOP AND SAVE SUPER MARKETS,

Plaintiff,

v.

THE UNITED STATES
(U. S. DEPARTMENT OF AGRICULTURE,
FOOD AND NUTRITION),

Defendant.

OPINION AND ORDER

Plaintiff, complaining of action of the United States Department of Agriculture, Food and Nutrition Service, in determining it had violated regulations of the Food Stamp Program and disqualifying it from participating in the Program for a year, filed this action. Authority

to maintain this action is pursuant to Title 7 U.S.C. § 2022. That section provides that if a store or concern "feels aggrieved by....final determination[1] he may obtain judicial review thereof by filing a complaint against the United States in the United States district court..." The suit in the district court "shall be a trial de novo[2] by the court in

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1/ Cancellation of a right to participate in the Program, with right to submit written statements is done administratively.

2/ In Globe-Union, Inc. v. Chicago Telephone Supply Co., 103 F.2d 722 (7th Cir. 1939), the Court said:-"We must always be conscious of the distinction between a de novo trial, where the case is tried a second time and the record is made up in the district court, and a court's review of findings of an administrative body, where the record is solely that of the administrative body." Words & Phrases, Vol. 12, page 107, and the supplement, page 10, cites numerous cases to the effect that "de novo" means a trial anew, as if no trial had been previously

which the court shall determine the validity of the questioned administrative action in issue." If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence.

The Act "does not provide for an evidentiary hearing at the administrative level." Save-More of Gary, Inc. v. United States, 442 F.2d 36 (7th Cir.1971). But as was pointed out in Peoples v. United States Department of Agriculture, 427 F.2d 561, 565 (D.C. Cir. 1970):-

> The specific review provisions in 7 U.S.C. §2022 both avoided any possibility that the distri-

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had; that the court is unaffected by the prior proceedings, and means a complete and full trial on the facts and the law; it is a trial as if no action had been previously instituted. See Hiner v. Wenger, 197 Va. 869, 91 S.E.2d 637, 639. See also Saunders v. U.S. F. Supp. (E.D. Va. 1971).

butors would be held without a legal right to complaint of adverse agency action, and gave them a trial de novo well beyond the scope of review available under the general provisions of the Administrative Procedure Act. See 5 U.S.C. § 706(2) (F).

Few cases have been decided under the Act, but Marbro Foods, Inc. v. United States, 293 F.Supp. 754 (D.C. Ill. 1968), held the scope of judicial review "was limited by Congress to a determination as to whether the agency's decision is valid, and that findings of an administrative agency are to be accepted upon judicial review unless they are unsupported by substantial evidence. It cites as authority O'Leary v. Brown-Pacific-Maxon, Inc., et al, 340 U.S. 504.[3/] To the same effect

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3/ O'Leary v. Brown, etc., 340 U.S. 504, was a challenge of an award under the Longshoremen's Act. The statute specifically limits the review. 33 U.S.C. 921. They are to be accepted unless they are unsupported by substantial evidence on the record.

is Save-More of Gary, Inc. v. United States, 309 F.Supp. 39 (D.C. Ind. 1970), affirmed 442 F.2d 36.[4/]

Plaintiff demands trial by jury, asserting there are issues of fact to be determined. Defendant opposes trial by jury.

Clearly, if Title 7 U.S.C. § 2022 limits the review to a determination of whether the agency's decision is supported by substantial evidence, then there clearly is no right to a trial by jury.

Since the Department makes a determination of whether the plaintiff will be deprived of his right to continue to participate in the Program, without a chance to hear the evidence against him, to examine and cross-examine witnesses,

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4/ If it is thus limited to the record, what does the term "trial de novo" mean.

and to testify, then it would appear the appeal is not limited.[5/]

In J. L. Saunders, Inc., t/a, etc. v. United States, _____ F.Supp.____ (E.D. Va. 1971), this Court held a person complaining of action of the United States under the Act in question was not entitled to a trial by jury. In a dissent in Ross v. Bernhard, 396 U.S. 531, Mr. Justice Stewart, joined by the Chief Justice and Mr. Justice Harlan, said that the Seventh Amendment merely preserved the right to a jury trial in suits at common law, and that "All agree that this means the reach of the Amendment is limited to those actions that men tried to the jury in 1791, when the Amendment was adopted."

5/ If he had been given these rights at the administrative level, we would have no issue here of due process.

In Luria v. United States, 231 U.S. 9, 27 (1913), dealing with an issue relative to revoking naturalization, it was said:

> Lastly it is urged that the District Court erred in not according to the defendant a trial by jury. The claim is predicated upon the Seventh Amendment to the Constitution, which declares that in "suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This, however, was not a suit at common law. The right asserted and the remedy sought were essentially equitable, not legal, and this, according to the prescribed tests, made it a suit in equity. Parsons v. Bedford, 3 Pet. 433, 447; Irvine v. Marshall, 20 How. 558, 565; Root v. Railway Company, 105 U.S. 189, 207. In this respect it does not differ from a suit to cancel a patent for public land or letters patent for an invention. See United States v. Stone, 2 Wall. 525; United States v. San Jacinto Tin Co., 125 U.S. 273; United States v. Bell Telephone Co., 128 U.S. 315.

In the case at bar, the relief sought is an injunction to enjoin the defendant from cancelling plaintiff's

right to participate in the Stamp Program. No damages are sought. It seems purely equitable relief. Farmers Chemical Ass'n. v. Union Camp Corp., 312 F.Supp. 214. Whether a jury is to be had "depends on the nature of the issue to be tried, rather than the character of the overall action." Ross v. Bernhard, supra. See also Katchen v. Landy, 382 U.S. 323; Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965).

Plaintiff says there will be issues of fact in the case which should be found by a jury, but "one cannot say that in our legal system the jury is a necessary component of accurate fact finding." McKeiver v. Pennsylvania, 403 U.S. 528, 543. Continuing, the Court said:

> There is much to be said for it, to be sure, but we have been content to pursue other ways for determining facts. Juries are not required, and have not been,

> for example, in equity cases, in workmen's compensation, in probate, or in deportation cases. Neither have they been generally used in military trials.

In a concurring opinion Mr. Justice White said that although the function of the jury is to find facts, "that body is not necessarily or even probably better at the job than the conscientious judge."

It must be admitted that the trend is toward extending the right to trial by jury to cases where it had not previously existed. Likewise, it must be conceded the line of separation of jury and non-jury is not always clear. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Simler v. Connor, 372 U.S. 221 (1963); Ross v. Bernhard, 396 U.S. 531 (1970); Katchen v. Landy, 382 U.S. 323; McKeiver v. Pennsylvania, 403 U.S. 528 (1971); Tights, Inc. v. Stanley, 441 F.2d 336 (4th Cir. 1971);

Boeing Co. v. Shipman, 411 F.2d 365, 384, concurring and dissenting opinion of Judge Rives.

Considering the nature of the issue to be tried rather than the character of the action [Ross v. Bernhard, 396 U.S. 531, 538], I am of the opinion a jury trial is not authorized or required. The request therefor is DENIED.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
June 26th, 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action
No. 671-71-N

RURAL FOODS, INC.,
t/a SHOP AND SAVE SUPER MARKETS,

Plaintiff,

v.

THE UNITED STATES
(U. S. DEPARTMENT OF AGRICULTURE,
FOOD AND NUTRITION),

Defendant.

MEMORANDUM OPINION AND ORDER

Rural Foods, Incorporated, trading as Shop and Save Super Markets (Rural) was duly authorized to participate in the program under the Food Stamp Act of 1964, 7 U.S.C. § 2011, et seq. Rural was duly briefed on the requirements of the program. Violations of the regulations governing the program were asserted, and

Rural was duly notified by letter. Subsequently, an investigation was made, as a result of which numerous violations were asserted to have been uncovered. Ineligible items were exchanged for food stamps, cash given in exchange for food stamps, purchasers using food stamps were shortchanged, and food stamps were accepted in payment for back bills. The details of the charges were set out in a letter dated April 28, 1971, from the Supervisor of the Food Stamp Program to the Manager of Rural, with a copy to Martin Glaser, President of Rural. Rural was advised that it might submit evidence, information or explanations to these violations. Upon review of the case, on July 7, 1971, Rural was notified that it was disqualified from participation in the Food Stamp Program for a period of one year to begin ten days after receipt of said

letter.[1] Timely review of such disqualification was duly made. On October 29, 1971, after review, the one year disqualification was upheld and approved, and this action followed.[2]

I

At the outset, the issue arises as to the extent of the review in the district court of the administrative action. The provisions of the Act, 7 U.S.C. §2022, provide that the store aggrieved by the administrative determination may obtain judicial review, "requesting the Court to set aside such determination", and that the suit instituted "shall be a trial de novo by the

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1/ Disqualification is pursuant to the provisions of 7 U.S.C. § 2020 and the Regulations enacted pursuant thereto. 7 C.F.R. 272.6 et seq.

2/ Judicial review of a disqualification is provided for in 7 U.S.C. § 2022.

Court in which the Court shall determine the validity of the questioned administrative action in issue. If the Court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence." Do the words de novo authorize the reviewing court to determine the issue of alleged violations and also what sanctions may be imposed?

A

This issue was decided by the United States Court of Appeals for the Fourth Circuit in Welch v. United States, _____ F.2d _____ (4th Cir. 1972), holding that judicial review of the administrative action was "limited to a determination of the validity of the administrative action" which was the action of disqualification. It pointed out that if violations were proven and if the

sanctions were within the allowable range, then the validity of the administrative action had been established. This holding is binding on this Court. It is supported by Martin v. United States, 459 F.2d 300 (6th Cir. 1972); Save-More of Gary, Inc. v. United States, 442 F.2d 36 (7th Cir. 1971), cert. denied 404 U.S. 987 (1972); Farmingdale Supermarket, Inc. v. United States, 336 F.Supp. 534 (D. N.J. 1971); Marbro Foods, Inc. v. United States, 293 F.Supp. 754 (N.D. Ill. 1968). See also Swift & Co. v. United States, 393 F.2d 247 (7th Cir. 1968); G. H. Miller & Co. v. United States, 260 F.2d 286, 296 (7th Cir. 1958), cert. denied 359 U.S. 907 (1959).

Rural says that Welch and the other cited cases dealt with situations where the violations were admitted, and that where the charges were admitted there was really nothing for the Court

to decide. But, where numerous charges have been levied against a store, and the administrator concludes all of the charges have been established - in this case thirteen separate charges - and as a result of the accumulation of charges determines the store should be disqualified for the maximum term, one year, in a de novo hearing if the evidence establishes that less than the thirteen violations are proved, then the Court should review the term of disqualification. Rural argues with force and good reasoning that here if only three of the thirteen charges were proven, it would be unfair to permit the same disqualification as would be permitted for thirteen violations. That is, if thirteen violations authorize and justify disqualification for one year, if substantially less than that number is proven at the de novo hearing, then the Court has the power and

duty to redetermine what period of disqualification is appropriate to match the proof. And applying such argument, if thirteen violations justify disqualification for one year (the maximum period), would proof of only one violation prevent the Court from redetermining and changing the period of disqualification? Rural says the Court should apply principles of equity.

In further support of its contentions, Rural says that the determination made by the administrator does not meet the requirement of due process; that it was for this reason the statute provided for a de novo hearing; and that due process and a de novo hearing require the Court to review each of the elements of the case, including the period of disqualification. Rural finds support for these contentions in the dissenting opinion in the Martin case and the con-

curring opinion in the Welch case.

But, it seems clear to me from Welch that this Court is not authorized to modify or alter the period of the disqualification fixed by the administrator if violations are proved and the period of disqualification is within the allowable range.

B

Secondly, it appears that the scope of review of the administrator's findings is a determination of the "validity of the questioned administrative action in issue". That is, a determination of whether the administrative action is valid. Thus, in Save-More of Gary, Inc. v. United States, supra, complaint was made of the action of the District Court in that it limited the scope of review to "determining merely whether the agency's decision was valid". In affirming such holding, the Court

pointed out that the Act provided "that the suit in the District Court shall be a trial de novo in which the Court shall determine the validity of the questioned administrative action in issue". [442 F.2d at 39[. In Martin v. United States, supra, the Court pointed out that the Act provided for "a review only on the merits of the case", which is a de novo review "of the final determination" of disqualification. It said that when the Court had made that determination because of violations of the provisions of the Act, it had completed its review. That is, "[U]pon making that determination the jurisdiction of the Court ended", and that under the Act the Court is authorized to enter such judgment or order as it determines is in accordance with the law and the evidence, "only if it determines that the administrative action is invalid". In Farmingdale Supermarket,

Inc. v. United States, supra, the Court said that the trial de novo is limited by the Act, which calls for a trial "to determine the validity of the Food Stamp Review Officer's disposition". And, in Marbro Foods, Inc. v. United States, supra, the Court said that the scope of review of the District Court was limited to a determination of whether the Agency's decision was valid; that findings of an administrative agency are to be accepted upon judicial review "unless they are unsupported by substantial evidence", 293 F.Supp. at 755, and that there was substantial evidence in that case to support the administrator's decision. It would seem from this last cited decision that the review is limited to the determination of whether the record contains substantial evidence to support the administrative findings. That is, like the review of the findings of the Secre-

tary in Social Security cases. But the review called for by the Food Stamp Act provides for a "trial de novo", not contained in the Social Security Review statute. See Peoples v. United States, 427 F.2d 561 (D.C. Cir. 1970).

As I view the opinion of the Court in Welch v. United States, the de novo review requires the Court to hear the evidence of alleged violations, and from the evidence heard to determine whether violations have been properly proven. "If the violations are proven--then the validity of the administrative action has been established." Welch v. United States, supra [page 7 of slip opinion]. Inasmuch as the trial is to be de novo, in keeping with what the Supreme Court said in United States v. First City National Bank, 386 U.S. 361, 368 (1967), the use by Congress of the words "trial de novo" means that "the

Court should make an independent determination of the issues".[3/]

II

Having determined that the Court has the duty to determine from the evidence presented before it whether the alleged violations have been properly proven, we turn next to the burden of proof. The United States asserts the burden of proof is upon Rural. It cites as authority Lewes Dairy, Inc. v. Freeman, 401 F.2d 308 (3d Cir. 1968). That case dealt with review of an order of the Secretary of Agriculture promulgated pursuant to the marketing Agreement Act

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3/ The Circuit Court of Appeals for the Fourth Circuit having determined in Welch v. United States, ____ F.2d ____ (4th Cir. 1972) that review is limited to disqualification action, and that the trial court has no power to deal with or modify the period of administrative sanctions, I am bound thereby.

of 1937, as amended. 7 U.S.C. § 608c. There, power of review of the Secretary's determination is not a de novo fact-finding process. It is limited to a determination as to whether the rulings "are in accordance with law and his findings are supported by substantial evidence". If they are, they are not to be disturbed. United States v. Mills, 315 F.2d 828 (4th Cir. 1963). The determination of an administrative agency carried "a presumption of the existence of facts justifying the determination" made, and "the burden of proof falls on the party challenging the validity of the agency's ruling". 401 F.2d 316. Findings of an administrative agency are to be accepted unless they are unsupported by substantial evidence. O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 508 (1951); Universal Camera Corp. v. Labor Board, 340 U.S. 474 (1951). Since this is a

trial de novo, what the Court said in United States v. First City National Bank, supra, seems to eliminate any presumption, and the Court is to find from all of the evidence the validity of the questioned administrative action.[4/]

For the purpose of this case it is not necessary to decide which party has the burden of proof.

III

The record establishes that in a criminal indictment returned in this Court[5/] Rural Foods, Inc., Martin Glaser, William Moore and Rose Wax were charged with some thirteen violations of the Food Stamp Act. On April 13, 1971, Rural Foods, Inc. entered a plea of guilty to count one of the indictment, which

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4/ See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)

5/ Criminal Action No. 180-70-N.

charged that the company did unlawfully and knowingly use, acquire and possess five $2.00 food stamp coupons for ineligible merchandise in violation of 7 U.S.C. § 2011, etc. On the same date Martin Glaser, President of the corporation, entered a plea of guilty to count four of the indictment charging that in his capacity as cashier, clerk and President of Rural Foods, he did unlawfully and knowingly use, acquire and possess twenty $2.00 food stamp coupons for ineligible merchandise. William F. Moore, Manager of Rural Foods, Inc., entered a plea of guilty to count nine of the indictment charging that as Manager of the store and within the scope of his employment, he unlawfully and knowingly used, acquired and possessed ten $2.00 food stamp coupons in exchange for the payment of $15.00 cash. All pleas were accepted by the Court, said parties found guilty and

sentences imposed. No appeals were taken and time for appeal has expired. Rural Foods introduced evidence of these convictions and thereafter stipulated the three guilty pleas and convictions.

It is clear that in a civil action where one of the issues is the guilty of a person convicted of a criminal offense, or some fact necessarily involved in the determination of such guilt, the courts are agreed that it is proper to admit evidence of the pleas of guilty to the criminal offenses. While the plea of guilty is admissible, the party is entitled to make an explanation thereof. Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967); State Farm Ins. Co. v. Worthington, 405 F.2d 683, 687 (8th Cir. 1968); Logan Square Auto Mart v. Com'r. of Internal Revenue, 291 F.2d 136, 140 (7th Cir. 1971) [plea of guilty of company and

president to income tax evasion admissible in proceedings for determination of tax due]; Kreps v. Com'r. of Internal Revenue, 351 F.2d 1, 6 (2d Cir. 1965) [plea of guilty to filing of false income return admissible in fraud charge]. To same effect, Upshaw v. Com'r. of Internal Revenue, 416 F.2d 737 (7th Cir. 1969), cert. denied 397 U.S. 962; Bagley v. Weaver, Adm'r., 211 Va. 779, 180 S.E.2d 686 (1971); Moore v. Skyline Cabs, 59 S.E.2d 437, 443 (W. Va. 1950); Annotation, 18 A.L.R. 2d 1307; Annotation, 31 A.L.R. 278; Annotation, 2 A.L.R. 2d Later Case Service 1221, supplementing 18 A.L.R. 2d 1307; 29 Am.Jur.2d, Evidence ¶701, at p. 758.

William F. Moore, the Store Manager, admitted in his testimony in this case that he did give $15.00 for $20.00 worth of stamps, and Glaser admits he accepted stamps in payment of past

due accounts.

A former cashier of plaintiff testified she accepted food stamps for ineligible items at the direction of Glaser, and that she had observed Glaser and Moore accept stamps in exchange for money. Two undercover shoppers were supplied with food stamps and sent to Rural Foods to exchange them for merchandise. On more than one occasion each of them received ineligible items for the stamps. Each of these shoppers also exchanged stamps for money, one exchange having been with Moore and two exchanges with Glaser. Also, Glaser admitted on the witness stand that he accepted stamps in payment of charge accounts.

Glaser and Moore denied the charges - except the instances set out above as admitted. Most of the evidence offered by Rural Foods was of a negative nature, namely, of persons who had been

employed by Rural Foods, asserting they had never seen Glaser take stamps for cash or never noticed a violation. Generally speaking, the positive testimony of credible witnesses, who testify they saw or observed a particular occurrence at a particular time, ordinarily outweighs that of an equal or greater number of equally credible witnesses, who merely testify they did not see or observe the events. Of course, the rule does not always apply where a witness testifies he did not see or observe what another says did occur. If there is evidence that the one who denies the fact had a good opportunity to observe at the particular time, and it is shown that he probably would have observed the events if they had occurred, or it is is shown that his attention was drawn to the situation where the events were supposed to have occurred, then his testimony is

positive and not negative. In such a case, the testimony of the one who says he did not see the events occur creates a conflict with the one who says he did see the events occur, which conflict is to be determined by the trier of the facts as to which testimony is entitled to greater weight. National Union Fire Ins. Co. v. Bruce, 208 Va. 595, 159 S.E.2d 815, 818 (1968); Virginian R.R. v. Haley, 156 Va. 350, 157 S.E. 776 (1931); Staples v. Spence, 179 Va. 359, 362, 19 S.E.2d 69, 71 (1942); Chesapeake & Ohio R.R. v. Kinzer, 206 Va. 175, 142 S.E.2d 514 (1965); Hall v. Hockaday, 206 Va. 792, 146 S.E.2d 215 (1966); Jones v. Chesapeake & Ohio R.R., 371 F.2d 545 (4th Cir. 1966). The mere fact that persons employed at Rural Foods did not observe the exchange of money for stamps or sale of ineligible items, or that they had never done so, does not overcome the positive testimony

of witnesses who did observe the events and took part in them. The attention of those who did not observe the events may not have been directed to the events on the occasions in question. They make no contention they were present or that their attention was directed to the occasions when the alleged violations were stated to have occurred. No reason is shown as to why they would have been observing on such occasions, or what may have alerted them to observe such occasions. Under the facts in this case, their testimony is of a negative character. Norfolk & Portsmouth Belt Line R.R. v. C. F. Mueller Co., 197 Va. 533, 90 S.E.2d 135 (1955); Nicholas v. Southern R.R., 187 Va. 89, 45 S.E.2d 913 (1948); Workman v. Wynne, 142 W.Va. 135, 94 S.E.2d 665 (1956).

While Glaser, speaking for Rural, asserts that when he learned Moore had

given money in exchange for stamps, he discharged Moore, that did not relieve Rural from the violation. Glaser also says he did not know of other violations. But that does not excuse the corporation. A corporation acts through its officers, agents, and is responsible for the acts of its agents even though the acts are committed without the knowledge of the officers of the corporation. United States v. Acme Process Co., 385 U.S. 138, 147 (1966); Gleason v. Seaboard Air Line R.R., 278 U.S. 349, 356 (1929). Moore was Manager of the store, and Glaser was an officer of the company.

The violations are established by a great preponderance of the evidence.

IV

The evidence presented before the Court, independent of any finding by the Secretary of Agriculture, clearly

establishes that Rural was in violation of the provisions of the Food Stamp Act; the administrative action taken by the Secretary in disqualifying Rural from participation in the Food Stamp Program for the period of one year is valid. As pointed out above, this Court is not authorized to modify the period of administrative sanction. Counsel may present a properly endorsed order for dismissal of the complaint.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
November 15th, 1972.

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 73-1512

Rural Foods, Inc.,
t/a Shop and Save Super Markets,

Appellant,

v.

The United States
(U. S. Department of Agriculture,
Food and Nutrition Service),

Appellee.

Appeal from The United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Argued January 8, 1974

Decided January 16, 1974

Before WINTER, BUTZNER and RUSSELL,
Circuit Judges.

PER CURIAM:

We find no error in the judgment of the district court. We are satisfied that Rural Foods, Inc. had no right to a jury trial to review the propriety of its disqualification from the federal food stamp program as a result of defendant's determination that Rural had violated the food stamp regulations in thirteen instances. Nor can we say that the court's finding that there was substantial evidence to support each infraction is clearly erroneous. Consequently there is no occasion to consider the argument that the district court should review the propriety of the period of disqualification when some, but not all, of the violations are proved.

A F F I R M E D.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1552

RURAL FOODS, INC., PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, Rural Foods, Inc., trading as Shop and Save Super Markets, brought this action in the United States District Court for the Eastern District of Virginia to set aside an administrative determination by the Department of Agriculture disqualifying petitioner for a period of one year from participating in the food stamp program.

Pursuant to 7 U.S.C. 2022, the Department had sent petitioner a letter of charges specifying thirteen allegations of violations of the Food Stamp Act and implementing regulations (J.A. 0007-0010).[1] Petitioner replied to the charges both in writing and through counsel. The Director of the Department's Food Stamp Division determined that petitioner had violated the regulations in the

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[1]"J.A." refers to the joint appendix filed in the court of appeals.

manner specified in the letter of charges. This determination was sustained upon administrative appeal by the Food Stamp Review Officer, and petitioner accordingly was disqualified from participating in the food stamp program for a period of one year (J.A. 0001-0006).

Petitioner then filed this action. The statute under which the action was brought, 7 U.S.C. 2022(c), provides that any store or concern aggrieved by a final administrative determination may seek judicial review in a district court "to set aside such determination" and such review "shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action." Petitioner requested a jury trial. The district court, applying the test laid down in *Ross* v. *Bernhard,* 396 U.S. 531, 538, determined that the nature of the issue to be tried was "purely equitable" and hence denied petitioner's request for a jury trial (Pet. App. 61-63).

After a full hearing, the district court upheld the administrative action on the merits (Pet. App. 64-86). The court found that "[t]he evidence presented before the Court, independent of any finding by the Secretary of Agriculture, clearly establishes that [petitioner] was in violation of the provisions of the Food Stamp Act" (Pet. App. 85-86), and held that "the administrative action taken by the Secretary in disqualifying [petitioner] from participation in the Food Stamp Program for the period of one year is valid" (Pet. App. 86). The court of appeals affirmed (Pet. App. 88).

1. Petitioner contends that the district court erred in denying its request for trial by jury. The crux of petitioner's argument is that the lower courts incorrectly applied the test laid down in *Ross* v. *Bernhard, supra,* and that the "logical extension" of this Court's recent decision in *Curtis* v. *Loether,* No. 72-1035, decided February 20, 1974,

requires a jury trial under the facts of this case. But *Curtis* involved a statutory action for damages of a nature traditionally tried before a jury at common law. By contrast, the issue to be tried in this case was equitable in nature. Under 7 U.S.C. 2022, the review action in the district court is "to set aside" the final agency determination, *i.e.*, to prevent the Secretary of Agriculture from enforcing the administrative disqualification against petitioner; such an action is tantamount to an injunction. See *Luria* v. *United States*, 231 U.S. 9, 27-28. It has long been established that the Seventh Amendment does not require a jury trial in an equitable action. See, *e.g.*, *Parsons* v. *Bedford*, 3 Pet. 433, 446-447.

Furthermore, the trial *de novo* in the district court is solely to determine "the validity of the questioned administrative action" (7 U.S.C. 2022(c))[2] and the Seventh Amendment is inapplicable to the review of administrative proceedings. Cf. *Pernell* v. *Southall Realty*, No. 72-6041, decided April 24, 1974 (slip op., p. 20); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; *Block* v. *Hirsh*, 256 U.S. 135.

2. Petitioner also claims (Pet. 46-52) that several of the Department's charges were not supported by any credible evidence. But this claim with respect to the sufficiency of the evidence was resolved against petitioner by the district court which found that all "[t]he violations are established by a great preponderance of the evidence" (Pet. App. 85), and this finding was upheld by the court of appeals. This factual issue warrants no further

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[2]See *Welch* v. *United States*, 464 F. 2d 682 (C.A. 4); *Martin* v. *United States*, 459 F. 2d 300 (C.A. 6), certiorari denied, 409 U.S. 878.

review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

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[3]Petitioner further contends (Pet. 36-46) that the district court erred in determining that it would uphold the disqualification even if less than all of the charged violations were proven. However, as the court of appeals noted (Pet. App. 88), that determination was purely *dictum* in view of the district court's finding that all the charged violations had been committed. Moreover, an otherwise valid sanction imposed by an administrative agency must be sustained in the absence of an abuse of discretion (*Pan* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182), and no such abuse was shown here.